

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

LeRoy Koppendraye
Marshall Johnson
Phyllis A. Reha
Gregory Scott

Chair
Commissioner
Commissioner
Commissioner

In the Matter of the Complaint by the
Department of Commerce Against Vonage
Holdings Corporation

ISSUE DATE: August 1, 2003

DOCKET NO. P-6214/C-03-108

ORDER DENYING TEMPORARY RELIEF

PROCEDURAL HISTORY

On July 15, 2003, the Department of Commerce (DOC) filed a complaint against Vonage Holdings Corporation (Vonage) alleging, among other things, that Vonage has offered and continues to furnish telephone services in Minnesota, including local exchange service and long distance service, without first obtaining a certificate under Minn. Stats. §§ 237.16 and 237.74, for those services. The complaint further alleges that the manner in which Vonage provides local service violates Minnesota law in that it fails to provide adequate 911 service.

The complaint includes a request for temporary relief that: a) prohibits Vonage from pursuing marketing efforts until it is properly certified in Minnesota, b) requires Vonage to provide a copy of its contract with its Gateway provider, c) requires Vonage to mail a notice to Minnesota customers, and d) requires Vonage to contact 911 authorities in Minnesota.

On July 22, 2003, the Commission issued its notice of the July 24, 2003 Commission meeting to consider the request for temporary relief.

On July 22, 2003, Vonage filed, by fax, its response to the DOC's request for temporary relief.

This matter came before the Commission on July 24, 2003.

FINDINGS AND CONCLUSIONS

The only issue addressed in this Order is whether temporary relief, as requested by the DOC, should be granted. The other issues raised by the DOC's initial complaint of July 13, 2003, will be addressed at a later date.

I. The Legal Standard for a Request for Temporary Relief

Minn. Stat. § 237.462, Subd. 7(c) states that:

After notice and an opportunity for comment, the commission may grant an order for temporary relief under this subdivision upon a verified factual showing that:

- (1) the party seeking relief will likely succeed on the merits;
- (2) the order is necessary to protect the public's interest in fair and reasonable competition; and
- (3) the relief sought is technically feasible.

II. The DOC's Request for Temporary Relief

The DOC requested that the Commission issue an Order that:

- prohibits Vonage from pursuing marketing efforts on all potential Vonage customers until Vonage has applied for and received proper certification from the Commission;
- requires Vonage to immediately provide a copy of its contract with its Gateway provider;
- requires Vonage to mail to its current Minnesota customers, a Commission-approved notice explaining that Vonage is not a certificated telephone company in the state of Minnesota and that Vonage's 911 service does not comply with state requirements;
- require Vonage, within five days of the date of the Commission's hearing in this docket, to contact the 911 Board and Department of Administration to submit a 911 plan for review.

The DOC argued that Vonage was offering telecommunications service in Minnesota and was therefore subject to the Minnesota statutes and rules governing this service. As support for this, the DOC stated that Vonage was advertising the offering of local and long distance service to Minnesota consumers. The DOC reported that Vonage stated on its website that "Vonage Digital Voice is an all-inclusive home phone service that replaces your current phone company," and characterized itself as "The BROADBAND Phone Company." It offered features typically offered with traditional local wireline telecommunications service including caller ID, call waiting and voicemail, and informed consumers that they could keep their current numbers or choose numbers within the (612), (952) (651) and (763) area codes.

The DOC argued that Vonage had not obtained a certificate of authority as required under Minn. Rules 7812.0200, Subd.1, or under parts 7812.0300 to 7812.0600.

Further, the DOC argued that Vonage was offering a 911 plan that did not comply with applicable state 911 requirements, including the requirement that the Company submit a 911 plan to the Minnesota Metropolitan 911 Board, the Minnesota Department of Administration, the DOC and the Commission.

The DOC argued that Vonage's 911 plan, as described on its website, did not meet Minnesota standards. The website indicated that its 911 plan had several important differences between its emergency dialing plan and traditional 911 dialing, such as requiring the customer to activate the 911 service before calls to 911 will work, and requiring the customer to pre-designate the physical location of the Vonage line. Further, Vonage's website indicated that its 911 calls will be routed to a different phone number than traditional 911 calls answered at Public Safety Answering Points (PSAP). The DOC argued that Minnesota 911 standards prohibit the routing of emergency calls by alternate means other than the native 911 network, with very limited exceptions.

It was the DOC's position that all statutory requirements for granting temporary relief have been met. It argued that Vonage was required to comply with Minnesota Statutes and Rules, and has not done so. For this reason, the DOC argued that it is likely to succeed on the merits.

It argued that the order for temporary relief was necessary to protect the public interest. Without it Vonage would continue to provide unauthorized service and would continue to represent that its service was a replacement to traditional telephone service. Further, consumers were at risk in the event of an emergency since a 911 plan has not been approved.

Finally, the DOC stated that the relief was technically feasible.

III. Vonage's Position

Vonage argued that it was not providing "telephone service" and was not a "telephone company." Rather, it was providing an Internet application that performs a net protocol conversion and permits voice communications between the Internet and the telephone network. It argued that this type of net protocol conversion was the hallmark of an information service, not a communications service, and was not within the scope of the Commission's regulatory jurisdiction. Neither Vonage's service nor Vonage itself was subject to the Commission's jurisdiction and for this reason the DOC was unlikely to prevail on the merits of its complaint.

Further, Vonage argued that the DOC has not shown that the requested relief was necessary to protect the public interest. Rather, granting the DOC's request would deprive Minnesota customers of the ability to access a new innovative Internet service.

Vonage also contended that the DOC's argument that Vonage's 911 plan is a risk to public safety was misleading. Vonage argued that it had advised its customers of the limitations on its 911 service and that the interim 911 service Vonage was providing is already used by other entities in Minnesota. Further, Vonage argued that the statutory standard that the DOC must meet for temporary relief required a showing that the relief protects the public interest in fair and reasonable competition, not public safety.

At the meeting before the Commission, Vonage indicated its willingness to meet and work with the Metropolitan 911 Board and the Department of Administration on its 911 plan. However, it was not willing to file as a telephone company.

Finally, Vonage argued that it might not be technically feasible to limit Vonage's marketing to Minnesota consumers or to mail notice to Vonage's customers that use its service in Minnesota. Vonage markets its services nationwide over the Internet so any restrictions on its marketing would impact Vonage nationwide. Further, since Vonage customers may purchase Vonage's service over the Internet, at retail stores, or through websites such as Amazon.com, and connect to Vonage's service over the internet, Vonage does not know where a customer is located at any given time.

IV. Commission Action

The Commission finds that an order for temporary relief is not warranted based on the record that has been established in this matter to date.

In applying the standards for temporary relief set forth in Minn. Stat. § 237.462, Subd. 7(c), the Commission is unable to conclude, based on the present record, that the DOC is likely to succeed on the merits of its claim, that temporary relief is necessary to protect the public's interest in fair and reasonable competition, or that the relief sought is technically feasible.

Based on the record before it, the Commission cannot determine the line between providing telephone services and providing information services. This determination is critical to the question of Commission jurisdiction. Both sides have made reasonable arguments, but without further record development the Commission is unable and unwilling to make any conclusions on jurisdiction. It follows that the Commission cannot conclude that the DOC is likely to succeed on the merits or meet the other statutory standards.

The Commission is concerned that there is a question of public safety when a company's 911 plan does not meet state standards. However, Vonage has represented to the Commission that it is willing to work with the 911 Board and the Department of Administration regarding its 911 plan and the Commission relies on that representation. The Commission, based on the record before it, is not persuaded that the proposed temporary relief is necessary to protect the public's interest in fair and reasonable competition.

Finally, the Commission is not persuaded that the relief sought is technically feasible due to the portability of the service.

For these reasons, the Commission will deny the request for temporary relief. The other issues raised in the DOC's complaint will be addressed in the regular course of this complaint proceeding.

ORDER

1. The request for temporary relief by the DOC is hereby denied.
2. This Order shall become effective immediately.

BY ORDER OF THE COMMISSION

Burl W. Haar
Executive Secretary

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